

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2277

Cir. Ct. No. 2011CV67

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ROLAND R. BOCHEK,

PLAINTIFF-RESPONDENT,

**JUDITH A. BOCHEK, BLUE CROSS & BLUE SHIELD UNITED OF
WISCONSIN, WISCONSIN PHYSICIANS SERVICE INSURANCE
CORPORATION, KATHLEEN SEBELIUS, SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, BLUE CROSS
BLUE SHIELD OF WISCONSIN AND FARMERS AUTOMOBILE INSURANCE
ASSOCIATION,**

PLAINTIFFS,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

MURIEL J. DE NAMUR,

DEFENDANT.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. West Bend Mutual Insurance Company appeals a money judgment entered in an automobile-accident personal injury action involving its insured, Muriel De Namur. West Bend seeks a new trial under WIS. STAT. § 805.15(1),¹ asserting the trial court erroneously submitted part of Roland Bocheck's claims to the jury without expert causation evidence. We agree that, with respect to his right knee injury, expert testimony was required. Accordingly, we reverse in part and remand for a new trial concerning Roland's damages.²

BACKGROUND

¶2 Roland and Judith Bocek were injured in an automobile accident in February 2010. Their vehicle was traveling approximately sixty-five miles per hour. De Namur failed to yield when crossing the highway and her vehicle struck the Bocheks' driver-side door, where Roland was seated. A witness to the accident, Jessica Cornette, testified that the collision caused the Bocheks' vehicle to become airborne and land on its roof. Roland allegedly suffered broken ribs, injured his lower back and hip on his left side, injured his neck and legs, and "hurt

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The jury found De Namur negligent in the operation of her vehicle, and 100% at fault in causing the accident. Those determinations were not affected by the knee-injury causation issue. Accordingly, those matters are no longer at issue in the event the case proceeds to a new trial. Judith Bocek's claims were also unaffected. Thus, the judgment also stands with respect to Judith Bocek's recovery.

all over.” Pictures taken after the accident showed bruising across Roland’s chest and extensive bleeding and bruising to his left lower back.³

¶3 Bocek, age eighty-four, had injured his right knee twenty years earlier when he jumped off a trampoline. He had received numerous treatments for the knee and been repeatedly advised to consider knee replacement surgery. However, Bocek stated he was “determined not to have it done as long as it—as long as I can get along.”

¶4 The history of Bocek’s knee injury was chronicled in medical records and relayed by his treating physicians. Records showed that in May 1995, the knee was swollen and difficult to stand on. The pain continued into June, when x-rays showed a deteriorated joint that likely needed replacement. In September 1999, arthroscopic surgery was performed on the knee. Bocek walked with a significant limp, but still did not desire replacement surgery. At the time, Bocek, who was five feet, ten and one-half inches tall, weighed 231 pounds. In February 2005, Bocek saw Dr. Henry Saperstein and complained of a swollen knee. Bocek related an incident, four months prior, where he had put all his weight on the knee while lifting and experienced pain. An x-ray showed degenerative changes with significant joint space narrowing.

¶5 Days after meeting with Dr. Saperstein, Bocek visited Dr. Sidney Schulman, who noted Bocek had experienced years of intermittent aggravation and discomfort. Bocek reported his pain had significantly increased since the incident four months earlier. Schulman noted that Bocek’s arthritic

³ We subsequently refer to Roland as Bocek.

changes were quite advanced and that conservative treatment would not provide Bocek with the ideal result. Nonetheless, Bocek elected only to have his knee aspirated.

¶6 Doctor Steven Davis first treated Bocek in August 2007. Bocek reported he had problems with his right knee “on again off again” for a number of years. The pain was getting worse and he wanted to know if anything else could be done. Following a physical exam, Davis determined Bocek had arthritic changes in his right knee. Davis removed fluid from the knee and administered a steroid injection.

¶7 Davis treated Bocek again in January 2008. X-rays showed degenerative and arthritic changes in the knee, including bone on bone changes on the medial compartment. Davis offered a total knee replacement as an option to treat the pain and swelling, but Bocek declined. Bocek returned to Davis within two weeks. The right knee had more fluid and bothered Bocek with increased activity and stress. Davis removed the fluid and administered another steroid injection.

¶8 Davis treated Bocek again in March 2008. Davis indicated at this time that all three parts of the knee (medial, lateral, and patella femoral joint) were affected by degenerative disc or joint disease. Davis believed Bocek was a candidate for knee replacement if he wanted it, but Bocek did not desire to have the surgery at that time. Bocek explained he was still having knee pain following the injections, but “not that much.”

¶9 In October 2008, sixteen months before the accident, Bocek was referred to Dr. Michael Tressler for right knee problems and to explore the potential of having a partial knee replacement. Following an exam, Tressler

determined Bocek had severe arthritic changes and degenerative arthritis in the knee. Tressler recommended a knee replacement, but Bocek instead opted to aspirate the knee. Tressler wrote a letter to Bocek's family doctor stating that the long-term solution to the joint disease was a knee replacement.

¶10 Chiropractor Cathleen Hietpas first treated Bocek in October 2008 for left hip and leg pain. Bocek also reported some aching in his right knee. Bocek returned to Dr. Tressler in November 2008 for an injection in his right knee. Tressler testified that Bocek was going to consider a knee replacement in 2009, but never returned to his office in 2009 or 2010.

¶11 Bocek visited his family physician, Dr. Kelton Reitz, in October 2009 and reported his knee caused him occasional discomfort, but he was not ready to have it replaced. Bocek saw Reitz again on January 28, 2010, and similarly reported that he had occasional knee pain, but it was not severe enough that he wanted anything done about it.

¶12 Following the February 7, 2010 accident, Bocek was able to walk around at the scene. Bocek testified he did not have any knee pain at that time. Dr. Hietpas began treating Bocek again on February 17. At that time, he complained of various problems from the accident concerning his neck, arm, shoulder, and rib, but did not complain of right knee pain.

¶13 Hietpas testified that the rib, neck, and arm pain resolved by March 2010, and that lower back and knee pain surfaced sometime after the initial visit. The first mention of Bocek's knee in Hietpas's records was on February 24, 2010, with notes that Bocek had sore knees, right knee swelling, and that "it's been there for a while."

¶14 Hietpas noted a sore right knee again on March 15. On March 17, Hietpas noted the knee was sore “from walking around shopping all day yesterday.” Bocek reported no knee pain during visits on March 22, 24, 29, and 31, or on April 7 and 14. On April 21, Hietpas noted the knee was “a little more sore.” On April 28, Bocek reported his knee was sore and he did a lot of walking the previous Saturday.

¶15 On May 12, 2010, Bocek’s knee was feeling “worse than ever,” and Hietpas referred him back to Dr. Davis. The referral was made after twenty treatments with Hietpas. The referral indicated:

Thank you for agreeing to see Roland Bocek for examination of his right knee. He was involved in a car accident on February 2 [sic], 2010 in which he sustained injuries to his neck and low back. He complained of some right knee tenderness on palpation but he stated he had had it for “quite some time.” I did not feel any ligamentous instability upon exam and performed some gentle manipulation to the knee in addition to his spine. He has responded well to treatment but the knee has not resolved. I would appreciate your expert opinion in this matter.

¶16 Bocek met with Dr. Davis later that month and explained that his knee had been bothering him more since the accident. Davis determined the pain in Bocek’s right knee was on the same side of the knee as prior to the accident. X-rays taken on that date showed there were no fractures to the knee. The x-rays showed degenerative changes and chondrocalcinosis, which Bocek had before the accident. The knee had advanced arthritis, and Davis again recommended a total joint arthroplasty. Bocek decided to have the knee replacement. Davis scheduled the surgery twice, but it was cancelled due to medical problems and a personal issue.

¶17 Bocek returned to Dr. Tressler in September 2011, about nineteen months after the accident, to schedule a right knee replacement. Bocek never told Tressler about the car accident. Tressler performed the surgery later that month. Tressler testified that a knee replacement surgery is an elective procedure, meaning that the patient determines whether the procedure is performed, provided that the doctor has made the appropriate findings for the surgery. Doctor Davis explained that the main determinative reason is the amount of pain a patient is experiencing. Bocek testified he decided to have the surgery because the pain suddenly got to the point where he could not get around.

¶18 Doctor Tressler and Dr. Davis were both unable to render opinions as to whether the accident was a cause of Bocek's right knee injuries. They were also unable to render opinions as to whether the degenerative joint disease was aggravated or accelerated by the accident.

¶19 Doctor Hietpas, on the other hand, testified at trial that the accident was a cause of the increased pain in Bocek's knee. Hietpas theorized that the injuries to Bocek's left hip caused him to favor that side, resulting in increased stress to Bocek's right knee. This opinion testimony, however, was stricken by the trial court on the grounds that it did not qualify under the *Daubert*⁴ standard for expert testimony set forth in WIS. STAT. § 907.02(1).

¶20 West Bend moved for dismissal of Bocek's right knee claim, arguing it required expert medical evidence of causation. The court denied the motion, concluding the jury could decide whether to accept Bocek's claims of

⁴ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

increased pain and, if so, whether it resulted from the accident. Bocheck introduced evidence of past medical bills related to the accident totaling approximately \$83,300. Of that amount, roughly \$73,100 was attributable to the knee replacement surgery. Among other damages, the jury awarded Bocheck approximately \$62,600 for past medical expenses.⁵

¶21 West Bend moved for a new trial pursuant to WIS. STAT. § 805.15(1), asserting error in the trial. West Bend argued it was erroneous to submit Bocheck's right knee claim to the jury without expert medical evidence of causation. The court denied the motion, and West Bend now appeals.⁶

DISCUSSION

¶22 West Bend argues the trial court erroneously denied its WIS. STAT. § 805.15(1) motion for a new trial, based on error in the trial.⁷ Determining whether expert testimony is necessary in a given situation presents a question of law subject to de novo review. *Grace v. Grace*, 195 Wis.2d 153, 159, 536

⁵ The jury also awarded Bocheck \$100,000 for past pain, suffering, and disability; \$25,000 for future pain, suffering, and disability; and \$10,000 for future medical expenses.

⁶ The trial court did, however, strike Bocheck's \$10,000 award for future medical expenses. The court determined that, without expert testimony for causation, the issue of future damages was too complex and resulted in speculation. Bocheck does not appeal that ruling.

⁷ WISCONSIN STAT. § 805.15(1) provides, in part:

A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

We observe that West Bend did not cite, here or in the trial court, WIS. STAT. § 805.14, concerning challenges to the sufficiency of the evidence. Nor has West Bend cited the standard of review applicable to such a motion.

N.W.2d 109 (Ct. App. 1995). Wisconsin courts have “long recognized that certain kinds of evidence are difficult for jurors to evaluate without the benefit of expert testimony.” *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995). Consequently, a trial court may decline to permit the case to go to the jury in the absence of expert testimony. *Id.* at 378-79.

¶23 However, “requiring expert testimony rather than simply permitting it represents an extraordinary step, one to be taken only when ‘unusually complex or esoteric issues are before the jury.’” *Id.* at 379 (quoting *White v. Leeder*, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989)). “Before expert testimony is required[,] the circuit court must find that the matter involved is ‘... not within the realm of the ordinary experience of mankind ...’” *Id.* (quoting *Cramer v. Theda Clark Mem’l Hosp.*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969)). Expert testimony is required when cases are so complex or technical that the jury would be merely speculating without it. *Cramer*, 45 Wis. 2d at 152.

¶24 For example, courts have required expert testimony in many medical cases, because medical practice demands special knowledge, skill, or experience. *Weiss*, 197 Wis. 2d at 379. Even in the medical realm, however, courts have limited the expert testimony requirement to those matters outside the common knowledge and ordinary experience of an average juror. *Id.* “Thus ‘whether expert testimony is required in a given situation must be answered on a case-by-case basis.’” *Id.* at 380-81 (quoting *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 7, 186 N.W.2d 258 (1971)).

¶25 Bocek argues, “The question to be considered in this case is ‘did [he] have increased pain in his right knee, which led him to request the knee replacement procedure ...?’” Bocheck further argues, and West Bend concedes,

that when a verdict depends upon current or past complaints of pain, expert medical testimony is not required to support a finding that the pain, in fact, exists. *See Drexler v. All Am. Life & Cas. Co.*, 72 Wis. 2d 420, 428, 241 N.W.2d 401 (1976). However, Bocek is mistaken in his characterization of the issue. The question is not whether Bockeck experienced increased pain, but whether the accident contributed to that increased pain. Specifically, West Bend argues, “under the unique facts of this case, there was no way for the jury to conclude without speculating that the increased pain in Bocek’s right knee was caused by the accident.” We agree with West Bend.

¶26 At the time of the accident, Bocek was eighty-four years old and suffered from a chronic knee condition. The pain had increased and subsided repeatedly over the course of fifteen years, but never completely resolved. During that time, Bocek’s physicians repeatedly suggested knee replacement surgery as the ultimate remedy. There is little question that Bocek was a tough farmer who was determined not to have the surgery unless and until the pain became too debilitating. Nonetheless, in the absence of supporting expert medical testimony, the jurors were left to speculate whether Bocek’s increased pain resulted from the natural progression of his degenerative knee condition, or was instead exacerbated by the car accident in which Bocek apparently suffered no direct trauma to the knee and that caused Bocek no immediate knee pain.

¶27 Bocek presented no evidence linking his increased pain to the accident. His argument improperly relies on the theory of causation proffered by his chiropractor. The trial court excluded not just Dr. Hietpas’s ultimate opinion that the accident caused increased knee pain, but also Hietpas’s theory as to how that occurred.

¶28 Further, this case is factually dissimilar to the two cases Bocek cites where expert medical testimony was deemed unnecessary.⁸ In *State v. Owen*, 202 Wis. 2d 620, 632, 551 N.W.2d 50 (Ct. App. 1996), the jury was allowed to infer causation. We held that, based on common knowledge and experience, jurors could conclude that a forceful slap to a three-month-old baby’s chest caused the spasms and difficulty breathing that immediately followed the blow. *Id.* at 634-35.

¶29 In *Martindale v. Ripp*, 2001 WI 113, ¶¶64-65, 246 Wis. 2d 67, 629 N.W.2d 698, the court held that expert accident reconstruction or kinematics testimony was not required in a simple rear-end automobile accident case for an elementary discussion of whiplash. The court explained, “Expert testimony ... is not necessary to confirm the potential for whiplash when a fully loaded garbage truck smashes into a barely moving or stopped automobile, ... sending it 100 to 150 feet from the point of origin, and causing \$9000 in damages to the vehicle.” *Id.*, ¶65. “Whether expert testimony is required in a given situation must be answered on a case-by-case basis[.]” *Netzel*, 51 Wis. 2d at 7, and this case is not arguably comparable to the simple fact situations presented in *Owen* and *Martindale*.

¶30 Finally, Bocek emphasizes that prior to the accident he had lost forty pounds and his knee pain had been on the wane. These factors do not, however, remove the case from the realm of speculation, particularly given

⁸ Bocek provides no pinpoint citations in support of his discussions of the two cases. A general case citation (neither of which was in the proper format) is insufficient to support a developed argument. See WIS. STAT. RULE 809.19(1)(e); *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

Bochek's advanced age and the duration and degenerative nature of his knee condition. Determining the cause of Bochek's increased knee pain was not "within the realm of the ordinary experience of mankind." See *Cramer*, 45 Wis. 2d at 150.

¶31 As set forth above, the majority of Bochek's claimed past medical expenses could only have been awarded for expenses associated with his knee replacement surgery. Additionally, the jury was not asked to apportion Bochek's other damages between knee-related and other injuries. Accordingly, we remand for a new damages trial with respect to Bochek's claims, and at which Bochek's knee replacement claims shall not be presented to the jury in the absence of expert causation testimony.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

